

## Extra Notice Needed if Attorney Prepares Nonpayment Court Papers, Says Federal Court

If you use an attorney to prepare your court papers (that is, the notice of petition and petition) to start a nonpayment case, the attorney must send an extra notice to the tenant, a federal appeals court recently ruled. The court said the court papers qualify as an “initial communication” from a debt collector, triggering compliance with the federal Fair Debt Collection Practices Act (FDCPA). In the past, courts had ruled that this extra notice was required if the attorney signed or prepared the rent demand that precedes these court papers. Now, the federal court has extended this requirement to attorney-prepared court papers, even if you—and not the attorney—prepared and signed the rent demand.

Once the FDCPA applies, the attorney must disclose to the tenant in a separate notice that he’s trying to collect a debt on behalf of the owner, and give the tenant 30 days to consent to the debt’s validity. We’ll give you some background on how the FDCPA affects nonpayment cases, and tell you what the recent appeals court ruling says and how it affects you.

### How FDCPA Affects Nonpayment Cases

The FDCPA bars debt collectors from harassing debtors. And it requires a debt collector to send an initial communication to a debtor. In 1998, a federal appeals court covering the New York City area ruled that an attorney who signs any rent demand, including the typical three-day rent demand, is considered a “collector” under the FDCPA. And an attorney who signs a rent demand that doesn’t meet the FDCPA’s requirements (that is, by including an additional notice) is violating the law [Romea v. Heiberger & Assocs.]. (For more information about this case, see “Court Rules Attorney-Signed Rent Demand Violates Federal Law,” *ALI*, Feb. 1998, p. 5).

Then, in 2002, a federal district court extended this ruling so that it applied to rent demands that were *prepared* by attorneys, even if the owner signed it [Dowling v. Kucker, Kraus & Bruh]. (For more information about this case, see “Court Requires Additional Notice if You Send Attorney-Prepared Rent Demand to Tenant,” *ALI*, Aug. 2002, p. 9).

### FDCPA Now Applies to Attorney-Prepared Court Papers

In the case that led to the most recent ruling, the court took the above rulings one step further by applying the FDCPA to attorney-prepared court papers that formally start a nonpayment case—the notice of petition and petition. In that case, the owner had prepared and signed its own rent demand, explains Robert Sokolski of the Manhattan law firm of Sokolski & Zekaria P.C., who represented the tenant in this case. But the owner used an attorney to prepare the court papers. The attorney didn’t send the additional FDCPA-required notice. The tenant sued the owner’s attorney for violating the FDCPA. The owner’s attorney claimed that the FDCPA didn’t apply to the preparation of court papers because these weren’t an “initial communication” with the tenant. But the court disagreed. It ruled that the owner’s attorney violated the FDCPA by not sending the additional notice to the tenant within five days of this initial communication [Goldman v. Cohen].

**PRACTICAL POINTER:** If you and your attorney have been following the advice we gave you in past issues of *ALI*, your attorney should already have been sending the FDCPA-required notice if it either prepared or signed a rent demand on your behalf. Once your attorney has done this, she needn’t send it again after sending the nonpayment court papers she prepared, says Manhattan attorney

Adam Leitman Bailey. The FDCPA requires that this notice be sent only once. But if you prepared and signed the rent demand yourself and then used an attorney to prepare the court papers, the attorney must now send the additional notice within five days after the court papers are served on the tenant, he says.

### How Ruling Affects You

Your attorney must send a notice meeting the above requirements within five days after an attorney-prepared or attorney-signed rent demand is served on the tenant or within five days after the attorney-prepared court papers are served (if you prepared and signed your own rent demand), says Bailey. But you don't have to wait until the 30-day response period is over to either start or continue with your nonpayment case, he says.

Also, the court ruling shouldn't affect the validity of your nonpayment case, even if your attorney hasn't complied with the FDCPA by not sending the required notice, says Bailey. Courts have ruled that an attorney's failure to comply with the FDCPA isn't a valid defense to a nonpayment case. For example, an appeals court refused to throw out a nonpayment case against a tenant because the attorney-signed rent demand that started the case violated the FDCPA. It ruled that the tenant's claim wasn't a valid defense to the nonpayment case. Even if the rent demand violated the FDCPA, it was still valid for the purposes of the nonpayment case, the court said [*Wilson Han Assn. Inc. v. Arthur*].

And a federal court rejected a tenant's attempt to remove a nonpayment case from housing court to federal court based on an attorney-signed rent demand. The tenant claimed that a federal court should decide the case

### ► What Additional Notice Must Say

The additional required notice your attorney sends must:

- ◆ Tell the tenant the debt amount;
- ◆ State the name of the creditor (that is, the owner) to whom the debt is owed;
- ◆ State that unless the tenant disputes the validity of the nonpayment claim within 30 days after getting the notice, the debt collector (that is, the attorney) will assume the debt to be valid;
- ◆ State that if the tenant notifies the debt collector in writing within 30 days that the debt is disputed, the debt collector will get verification of the debt (or judgment against the tenant) and will mail a copy of the verification to the tenant. To verify a debt, the attorney will ask you for a copy of a rent ledger or some other document showing the months when the tenant didn't pay rent, says Robert Sokolski of the Manhattan law firm Sokolski & Zekaira P.C. This will ensure that the tenant does indeed owe you the rent claimed, so that you don't bring a nonpayment case against a tenant who has, in fact, paid the rent owed, he says.
- ◆ State that upon the tenant's request within the 30 days, the debt collector will give the tenant the name and address of the original creditor, if different from the current creditor.

because it involved a federal issue—namely, that an attorney-signed rent demand violated the FDCPA. But the court rejected both the tenant's attempt to move the nonpayment case to federal court and the tenant's claim that the FDCPA violation was a valid defense to a nonpayment case. The court called both claims “utterly frivolous” [*Arrey v. Beaux Arts II, LLC*].

**PRACTICAL POINTER:** This issue hasn't been decided by a higher New York State or federal court. So tenants may still try to get your nonpayment case dismissed if your attorney has violated the FDCPA. Also, tenants can still try to get your attorney who prepared the court papers in trouble, warns Bailey. And the penalties against an attorney who violates the law are stiff, he says. Tenants can sue for their actual damages, plus up to \$1,000 in other damages. ■

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